

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 85610-COA

FILED

APR 21 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER AFFIRMING IN PART AND DISMISSING IN PART*

Brian Kerry O'Keefe appeals from an order of the district court denying a motion to correct an illegal sentence and from a purported order of the district court denying a motion for judgment on the pleadings. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

*Motion to correct an illegal sentence*

O'Keefe appeals from an order denying a motion to correct an illegal sentence filed on June 27, 2022.<sup>1</sup> In his motion, O'Keefe claimed his sentence is illegal because the deadly weapon enhancement should not have been imposed. Specifically, he claimed he was convicted of a reckless crime and Nevada law requires that the person receiving the deadly weapon enhancement must have used the weapon in conscious furtherance of a criminal objective. Further, he claimed he was actually innocent.

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<sup>1</sup>O'Keefe filed a "motion to vacate facially illegal sentence of deadly weapon enhancement (NRS 193.165) based on constitution sudden change in law announced June 10, 2021, effecting substantive law; hearing requested." The district court construed it as a motion to correct illegal sentence, and O'Keefe does not challenge this on appeal.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). “A motion to correct an illegal sentence presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.” *Id.* (internal quotation marks omitted).

O’Keefe’s claims challenged alleged errors in the proceedings that occurred prior to the imposition of sentence; therefore, his claims were outside the scope of a motion to correct an illegal sentence. Thus, we conclude the district court did not err by denying the motion.

On appeal, O’Keefe argues that his conviction violates the Double Jeopardy Clause and the district court lacked jurisdiction to impose sentence. These claims were not raised below, and we decline to consider them on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

O’Keefe also argues the district court erred by considering the State’s response to his motion. He contends that the State filed an untimely response to his motion and did not address all of the claims raised in his motion. The State received an extension of time from the district court to file a late response, and the response was sufficient to address the claims raised in the motion. Further, even assuming it was error to allow the State to file a late response, given that O’Keefe’s claims were outside the scope of a motion to correct an illegal sentence, O’Keefe failed to demonstrate the alleged error affected his substantial rights. *See* NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall


be disregarded.”). Accordingly, we conclude the district court did not err in denying O’Keefe’s motion.

*Motion for judgment on the pleadings*

O’Keefe also appeals from a purported order denying a motion for judgment on the pleadings. O’Keefe claims the motion was “mailed – filed 9/15/2022.” Our review of this portion of the appeal reveals a jurisdictional defect. The record on appeal reveals that no such motion has been filed in the district court, and consequently, no order exists in this case. Because O’Keefe has failed to designate an appealable order, we lack jurisdiction to consider this portion of his appeal, and it must be dismissed.

For the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED and we order the appeal DISMISSED IN PART.<sup>2</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

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<sup>2</sup>We have reviewed all documents O’Keefe has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent O’Keefe attempts to present claims or facts in those submissions that were not previously presented in the proceedings below, we decline to consider them in the first instance. *See McNelton*, 115 Nev. at 415-16, 990 P.2d at 1275-76.

cc: Hon. Jacqueline M. Bluth, District Judge  
Brian Kerry O'Keefe  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk